ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

COMMENTS OF NEW PAR

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Dated: June 20, 1994

TABLE OF CONTENTS

SUMMARY

New Par concurs with the Commission's proposed classification of CMRS licensees as "substantially similar" to the extent that they serve substantially similar customer needs and demands. In making such classifications, New Par supports looking at the marketing techniques of the CMRS provider (whether the CMRS provider markets itself as a "cellular-like" service) or the conduct of customers (whether the services are in fact serving as a "cellular-like" substitute in the eyes of consumers -- notwithstanding the service provider's marketing intent). If either condition is satisfied then the CMRS provider should be classified as substantially similar for regulatory purposes.

Under this test all interconnected two-way voice and data services should be classified as substantially similar (e.g., cellular, mobile satellite services ("MSS"), interconnected SMR (both wide-area and non-wide-area), interconnected business radio service and two-way 220-222 MHz services) regardless of channel capacity, technical quality, or geographic range. Moreover, the fact that a CMRS provider does not compete on every level or only intends to serve a niche or sub-market does not mean that it does not compete for the same customer base.

Consistent with the Congress's intent to create parity in the marketplace all CMRS providers should receive similar treatment under the Commission's rules.

With regard to the Commission's specific proposals, New Par supports limiting the service areas of CMRS providers that compete with cellular to areas similar to those used for cellular. New Par also supports maintaining existing emission masks for the SMR and cellular services. New Par recommends modifying the antenna height and transmitter power limits for SMRs to conform to the height and power limits of cellular. The Commission should not establish standards for interoperability among all classes of substantially similar CMRS equipment. New Par suggests that the Commission adopt construction deadlines for CMRS providers similar to those required under Part 22 of the rules. Further, any elimination of the SMR loading requirements and the 40-mile rule should be tied to applicable technical parity rules to promote service to the public and deter spectrum warehousing. Because of the potential for interference in the SMR band, station identification should be retained for SMR carriers. A CMRS spectrum cap is necessary to achieve regulatory parity in light of the Commission's decision to impose spectrum aggregation

limits on PCS and PCS-cellular aggregation. Further, Part 90 licensees should not be "grandfathered" with respect to the spectrum cap. The Commission's EEO rules should be equally applicable to all (large and small) CMRS providers. The Commission should adopt application rules for Part 90 CMRS entities comparable to those applicable to Part 22 entities, including applicable public notice and petition to deny procedures. Finally, the Commission's resale policy and test for determining "control" should be equally applicable to all CMRS providers without distinction.

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To: The Commission

COMMENTS OF NEW PAR

New Par hereby submits, by its counsel, comments in response to the Further Notice of Proposed Rule Making ("Further Notice") in the above-captioned proceeding.

STATEMENT OF INTEREST

New Par, through partnerships or subsidiaries, operates cellular systems in 22 MSAs and RSAs throughout the States of Ohio and Michigan, including five of the top 40 MSAs. Thus, New Par has a significant interest in the modification of the Commission's rules to create regulatory parity between cellular licensees and Part 90, PCS,

and other cellular-like providers now classified as commercial mobile radio service ("CMRS") providers.[1]

A. Classification of Part 90 Services and "Substantially Similar" Common Carrier Services

New Par concurs with the Commission's proposed classification of CMRS licensees as "substantially similar" to the extent that they serve substantially similar customer needs and demands. Further Notice, at ¶ 13. Congress's intent in providing for regulatory parity among CMRS providers was to ensure that those entities vying for the same customer base would compete on substantially equal grounds. See H.R. REP. NO. 103-111, 103rd Cong., 1st Sess. (1993). Accordingly, any attempt to create regulatory parity must be guided by the extent to which the different types of CMRS providers compete for the same customer base through the provision of generally substitutable services.[2]

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[1] New Par is a partnership controlled equally by subsidiaries of Cellular Communications, Inc. ("CCI"), a publicly traded company, and AirTouch Communications, Inc. ("AirTouch"), a publicly traded company formerly known as PacTel Corporation, then a subsidiary of Pacific Telesis Group.

[2] Such an approach is also generally consistent with federal antitrust law, which groups together in the same market those products for which a price increase in one would induce a sufficient amount of customers to switch to others within the group such that the proposed price

(continued...)

In classifying services as substantially similar, the Commission should use the marketing techniques of CMRS providers or the conduct of customers (i.e., whether they actually choose between two or more services). See Further Notice, at ¶ 14. Whether a CMRS provider affirmatively decides directly to compete for cellular customers by marketing itself as a provider of "cellular-like" services, or whether the CMRS provider's services are in fact serving as a "cellular-like" substitute in the eyes of consumers (notwithstanding the provider's marketing decisions), that service provider should be placed in the same playing field as cellular providers and other substantially similar CMRS providers. Taking this approach, CMRS is divisible into two distinct product markets: (1) two-way services (voice and data) and (2) one-way (including acknowledgement) paging and other messaging services.[3]

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[2](...continued)
increase would be unprofitable. See, e.g. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, Issued April 2, 1992 at 1.1.

[3] These comments address regulatory parity only among CMRS providers substantially similar to cellular carriers. New Par takes no position with respect to regulatory parity among non cellular-like CMRS services.

With respect to two-way voice and data services, those CMRS services which should be classified as substantially similar include cellular, mobile satellite service ("MSS"), interconnected SMR (both wide-area and non-wide-area), interconnected business radio service, and two-way 220-222 MHz services. Factors such as current channel capacity, technical quality, or geographic range of SMR and other would-be cellular competitors should not be considered. See Further Notice, at ¶ 16.

Further, once an interconnected business radio, 220-222 MHz, MSS, or SMR, etc. licensee seeks or commences offering a for-profit, interconnected mobile radio service, there is no reasonable basis to distinguish between these operators based upon their level of channel capacity, technical quality, or geographic range.[4] Moreover, the fact that CMRS providers do not compete on every level of the market but rather choose to target a specific market niche or sub-market (e.g. two-way paging, dispatch, data, etc.) does not mean that they do not compete for the same customer base. Cellular provides a multi-

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[4] For example, the Commission's rules provide SMR operators and other licensees the means with which to upgrade their systems to modify these factors. See Fleet Call, Inc. 6 F.C.C. Rcd. 1533, recon. dismissed, 6 F.C.C. Rcd. 6989 (1991).

tude of services including voice, paging, data, etc. Thus, the Commission's rules should put all CMRS carriers on parity such that cellular and other like service providers can effectively compete in the niche markets as well.

To the extent that a particular licensee desires certainty or clarification as to its status, it could request a declaratory ruling or other resolution from the Commission. See Further Notice, at ¶¶ 150-151. Alternatively, a licensee providing "cellular-like" services that failed to comply with the appropriate regulations, or failed to notify the Commission of a change in its status from a provider of private mobile radio service ("PMRS"), would be subject to Commission sanctions. See Standards for Assessing Forfeitures, 8 F.C.C. Rcd. 6215 (1993). In any event, the Commission would not need to classify each licensee on a case-by-case basis.

B. Technical Rules

1. Channel Assignment and Service Area

The Commission should reject several of its offered alternatives for cellular-like SMR operations. First, because there are no nationwide licenses for cellular or broadband PCS, the Commission should not license 800 MHz or 900 MHz SMR on a nationwide basis. See Further

Notice, at ¶ 34. Broadband PCS will be licensed for BTAs and MTAs, and cellular is licensed on an even smaller basis, namely MSAs and RSAs. If the Commission were to license wide-area SMR for larger geographical areas than that used in cellular and PCS, SMR would hold an unwarranted competitive advantage. Further, SMR operators have been largely unobstructed in their efforts to increase the size of their coverage areas and to add stations in those areas deemed most profitable.[5]

In any event, the geographic limits of cellular service areas (MSA/RSA), which are significantly smaller then the service areas allowed for PCS and those proposed for SMRs, will virtually preclude cellular carriers from effectively competing with similarly situated carriers. Accordingly, the Commission should license wide-area SMR

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[5] The only restrictions on the acquisition of additional SMR licenses have been the loading requirements and 40-mile separation rule for commonly owned SMR stations and the prohibition on transfers or assignments of licenses for unbuilt facilities. See 47 C.F.R. §§ 90.609 (b), 90.658. These restrictions, however, have imposed no practical burden on the ability of SMR licensees to create large, regional networks through the execution of management agreements for stations not fully loaded and the obtaining of future interests in those stations (e.g., purchase options). Further, the more flexible control criteria applied to private radio (as compared to cellular and common carriers generally) has further aided SMR's efforts to create regional systems larger than existing cellular systems. See infra pp. 14-15.

in areas comparable to those used for similarly situated service providers (i.e., MSA, RSA, MTA).

2. Emission Masks

New Par concurs that the differences in licensing and channel allocation between SMR and cellular make it impractical either to tighten emission standards for cellular or to loosen them for SMR. Further Notice, at ¶ 43. The higher emission masks applicable to SMR appear necessary to protect adjacent channel licensees offering different services, such as traditional SMR dispatch providers, from cellular-like operators on SMR frequencies. In fact, tighter emission masks may actually benefit the cellular industry by reducing levels of co-channel and adjacent channel interference within single systems. Modification of these rules for cellular, however, at this stage would be too expensive and burdensome to implement.

3. Antenna Height and Transmitter Power Limits

Antenna height and transmitter power limits are not as difficult to conform as are emission masks. In fact, reduction in the maximum permitted height and power limits of SMRs would actually benefit CMRS providers in minimizing potential interference and reducing the risk of EMF radiation while at the same time ensuring parity

among carriers. Therefore, the Commission should require SMR and PCS licensees providing interconnected service to limit their mobile unit power limits to 7 watts and to reduce the base station height and power limits to that provided in Part 22 for cellular licensees.[6]

In addition, consistent with Congress's intent to put competitors on equal footing in the market, because cellular is subject to such height and power limitations (and previously had been subject to even stricter height-power base station limits), all such competing carriers should be similarly restricted. Moreover, modifying these criteria for Part 90 cellular-like service providers would put such carriers on parity with cellular with respect to the build out of their networks and prevent such competitors from constructing one or two-way high power base stations where cellular is limited to lower power and height. In any event, the natural tendency of any mobile service system is to build progressively smaller cell sites, therefore using lower power and antenna heights as systems mature. Thus, as interconnected SMR systems are built out, SMR licensees can much more easily build into the tighter restrictions than

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[6] Given the nature of the MSS service, different limits will need to apply to MSS operators.

cellular could take advantage of the more liberal Part 90 rules.[7]

Moreover, the base station height and CPE power limits minimize the potential for interference (as well as harmful EMF radiation). SMR is more inclined to experience interference due to the allocation of non-contiguous frequencies and the presence of traditional SMR operating on the same frequencies. Therefore, imposing stricter height and power requirements on SMR would create higher quality systems.

4. Interoperability

The Commission should not establish standards to achieve interoperability among all classes of substantially similar CMRS equipment. See Further Notice, at ¶ 57. Given the different bandwidth, channel allotments, emission masks limits, transmission, and other rules, establishing interoperability among MSS, SMR, cellular, PCS, 220-222 MHz, and other future substantially similar CMRS services would be too expensive, too time-consuming, and could significantly reverse the trend towards smaller

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[7] Indeed, relaxing the height-power limitations on cellular at this late date to create parity would not enable cellular licensees to enjoy whatever benefits there may have been had they been able initially to build out their systems under such rules.

and lighter CPE. Moreover, given the number of competitors in each market (potentially more than 10, including resellers and MSS), it is not necessary to ensure competition through the fungibility of CPE.

For the same reasons, no new interoperability standards should be adopted within PCS, SMR, or other substantially similar services. These emerging new technologies will likely support niche markets and may provide highly specialized services.[8] To require interoperability among these various service providers would likely detract from an operator's ability to design its offerings to meet specific needs. Instead, the Commission should adopt its third alternative, maintaining the status quo by refraining from any extension of the cellular interoperability requirements to other classes of CMRS service. If the marketplace requires carriers to provide interoperable equipment within each class of service (i.e., SMR or broadband PCS), then the service providers and the equipment manufacturers will do so.

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[8] See Implementation of Section 309(j), 75 Rad. Reg. (P&F) 2d 230 (1994). This does not mean, however, that such services are not substantially similar to cellular service. For instance, these niche markets may be in particular aspects of data delivery, such as wireless facsimile, or may focus on local area networks, both of which compete directly with cellular and which in many markets today are provided by cellular carriers.

Finally, it would create significant customer confusion to eliminate the cellular interoperability requirements. Nevertheless, provided that cellular continues to offer equipment that is consistent with established interoperability standards, it should also be permitted to offer non-interoperable equipment so it can compete for specialized services on its cellular frequencies. This would promote the regulatory parity that Congress has mandated.

C. Operational Rules

1. Construction, loading requirements, cover age requirements

In creating regulatory parity between cellular-like SMR and other Part 90 services and cellular and PCS, the Commission must recognize that most cellular systems, particularly those in metropolitan areas, have fully expanded to their Commission-designated borders. This is not the case with respect to other cellular-like systems, including SMR. These other services, therefore, should be required to adhere to construction deadlines comparable to those with which cellular licensees had to comply.[9] Any elimination of the SMR loading requirements

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[9] The Commission has already adopted such rules for PCS. See 47 C.F.R. §§ 24.103, 24.206.

and 40-mile rule should be tied to such technical parity rules to promote service to the public and deter spectrum warehousing. See supra p. 5-11.

2. Permissible Uses

Here too, New Par supports the Commission's attempt to regulate parity for substantially similar services. Accordingly, the restrictions on Part 90 licensees regarding the provision of common carrier services and the purpose and duration of communications should be eliminated to the extent that such licensees provide for-profit, interconnected service. The same should be true, however, with respect to restrictions on Part 22 licensees unparalleled in Part 90. For instance, the prohibition on the concurrent use of licensees' base stations for non-common carrier purposes (other than incidental or emergency situations) should be eliminated and cellular licensees should be given the same flexibility as SMR and PCS licensees to use portions of their spectrum to non-common carrier offerings, provided that they can still meet their common carrier obligations.[10]

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[10] This issue is the subject of a separate rulemaking. See Notice of Proposed Rulemaking and Order, CC Docket No. 94-46, Released June 9, 1994 (Proposing to Delete Section 22.119 and Permit the Concurrent Use of Transmitters in the Common Carrier and Non-Common Carrier Services).

3. Station Identification

The record in the cellular industry demonstrates that station identification is unnecessary because the source of any frequency interference or call capture can generally be identified by other methods. This is not the case for 800 MHz SMR licensees, which are not licensed to clearly discernible frequencies in a pre-designated area on an exclusive basis. Therefore, some type of station identification transmission is necessary to control frequency interference issues, including those between 800 MHz SMR and cellular. Use of a single call sign for multiple SMR stations within a designated area would lessen any burden on SMR in broadcasting its call signs. Further Notice, at ¶ 82.

4. General Licensee Obligations

The Commission's attempt to equalize the general obligations of Part 22 and Part 90 licensees offering similar services should include the extension to Part 90 licensees of at least two other Part 22 principles: (1) resale and (2) the test for determining "control."

Just as cellular licensees are required to offer service on a non-discriminatory basis to resellers, other substantially similar CMRS licensees should have the same obligation. This too will promote parity among CMRS

providers and is consistent with the Commission's holding that common carriers must enable resellers to purchase and re-offer their services.[11] The resale obligation, however, should not apply to CMRS licensees seeking to resell the services of another CMRS licensee in the same geographic area. Such a cross-resale rule would be a disincentive to facilities-based competition and would encourage newly licensed CMRS providers to benefit from the decade of efforts cellular carriers have undertaken.[12]

With respect to control, SMR has not been subject to the same six-part test applicable to common carriers. See Intermountain Microwave, 24 Rad. Reg. 983 (1963). In fact, SMR licensees regularly have taken steps that, under Intermountain Microwave, would have constituted a transfer of control to a managing entity that had taken over day-to-day operation of facilities, personnel decisions, policy decisions, and financial decisions and transactions. Although the Commission is currently re-

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[11] See, e.g., Cellular Communications, 86 FCC 2d 469, 511 (1981)(resale of cellular service could promote competition); Resale and Shared Use, 60 FCC 2d 261 (1976), recon. granted in part, 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978).

[12] The Commission has adopted such a limitation with regard to the cellular service. See 47 C.F.R. § 22.914(a).

viewing Intermountain Microwave in the wake of Telephone and Data Systems, Inc. v. FCC, No. 92-1273 (D.C. Cir. March 25, 1994), its resulting policy should apply to all CMRS licensees. See Ellis Thompson, File No. 14261-CL-P-134-A-86, DA 94-376, released April 20, 1994.

5. Equal Employment Opportunities

The Commission asks whether the current exemption from EEO requirements for licensees with fewer than 16 employees provides sufficient flexibility for small businesses currently regulated under Part 90 that would be subject to new EEO rules. Further Notice, at ¶ 85. There is no sound rationale for distinguishing between small business Part 22 licensees and Part 90 licensees. The grandfathering of newly subject CMRS licensees until 1996 will give these entities sufficient time to implement procedures to comply with the EEO rules.

D. CMRS Spectrum Aggregation Limit

A CMRS spectrum cap is necessary to achieve regulatory parity in light of the Commission's decision to impose spectrum aggregation limits on PCS and PCS-cellular aggregation. Accordingly, similar spectrum limits, attribution standards, and geographical limits should be imposed upon all other substantially similar CMRS providers. In contrast, spectrum aggregation limits are not

warranted for CMRS licensees that do not provide substantially similar services. For instance, there should be no limitation on a PCS, cellular, or cellular-like SMR licensee's ability to acquire narrowband PCS or paging frequencies in the area where it also provides cellular-like services.[13] The services are not currently anticipated to compete with one another and, prior to development of the marketplace, any aggregation limits between licensees not deemed substantially similar would be premature and could hamper development of emerging technologies. If these industries later begin to converge to a point where they become substitutable, see supra pp. 2-5, the Commission can impose appropriate spectrum aggregation caps at that time.

1. General Spectrum Cap Alternatives

Since cellular licensees are limited to 35 MHz of cellular/PCS spectrum in their service territories, the same limit should be imposed upon other providers of substantially similar services. (Broadband PCS licensees not providing cellular in their PCS areas may aggregate up to 40 MHz of spectrum.) Because there is approximate-

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[13] New Par takes no position with respect to any spectrum cap necessary within the paging/narrowband PCS CMRS category.

ly 25 MHz of SMR spectrum available (between 800 MHz, 900 MHZ, and business radio frequencies), Part 90 licensees should be subject to the same 35 MHz spectrum cap applicable to cellular. Because an SMR licensee would not necessarily hold all of the available SMR frequencies in a given area, it will have more flexibility in applying for broadband PCS licenses (by aggregating multiple 10 MHz licenses or even acquiring a 30 MHz license) than would a cellular licensee.

This 35 MHz cap should include all types of cellular-like service, including two-way 220-222 MHz operators and SMR providers.[14] Moreover, in response to the Commission's question regarding deferring the application of spectrum caps to MSS pending the completion of international coordination for MSS space segments, New Par submits that the limits on satellite-delivered services should apply immediately. See Further Notice, at ¶ 99. Given the possible delays in completing such international coordination, these service providers could have a distinct, but unwarranted, service advantage (i.e.,

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[14] With respect to satellite-delivered services such as MSS, the Commission should adopt separate spectrum caps designed to ensure such carriers have no greater service capacity than any other substantially similar CMRS providers.

holding excess spectrum) for a potential lengthy period of time. See also infra pp. 19-20.

a. Geographic Areas

The most optimum method for applying spectrum caps is to base them on the actual service areas. In doing so, the Commission should establish a maximum overlap (e.g., 10% of service area) before separate (but substantially similar) CMRS allocations would be subject to a cap. Applying a cap's geographical component on a predesignated regional basis would not be any easier to administer[15] and would unnecessarily preclude entities from acquiring spectrum in areas where they do not provide any similar service.

b. Attribution Standards and Designated Entities

Part 22 currently imposes on common carriers an attribution level of 5% ownership.[16] This same attribution standard must therefore also be applied to all CMRS applicants. There would be no basis to distinguish on a service-by-service basis the level of ownership to which

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[15] Indeed, the Commission has long-applied actual contour overlaps in its multiple and cross-ownership rules. See 47 C.F.R. § 73.3555. Licensees are simply required to inform the Commission of any prohibited overlaps.

[16] 47 C.F.R. § 22.13(a)(1).

the Commission will attribute sufficient input to confer attributes of control or ownership. Similarly, with respect to the service area overlap, the 10% of population standard applied to cellular-PCS should be applicable to other CMRS applicants and licensees providing cellular-like services. Again, a 10% overlap between cellular-like SMR and PCS raises the same market share issues as a 10% overlap between cellular and PCS.

Finally, there is no basis to adopt higher attribution levels or spectrum limits for designated entities. See Further Notice, at ¶ 103. In its PCS proceedings the Commission adopted sufficient mechanisms in the form of preferences to enable designated entities to participate in the provision of cellular-like and other CMRS services. See Second Report and Order, 8 F.C.C. Rcd. 7700 (1993); Third Report and Order 9 F.C.C. Rcd. 1337 (1994). Until demonstrated that such methods are unsuccessful, no additional measures are necessary.

2. Grandfathering of Part 90 Licensees

Part 90 licensees should be subject to the spectrum cap during the transition period expiring August 10, 1996. If grandfathered, SMR licensees are permitted to acquire spectrum in excess of the cap. An entity acquiring spectrum that it knows must later be divested